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**BIRDSBORO KOSHER FARMS CORP.**

**UNITED STATES DISTRICT COURT**  
**CENTRAL DISTRICT OF CALIFORNIA**

YORAM COHEN, an individual,  
  
Plaintiff,

vs.

BIRDSBORO KOSHER FARMS CORP., a  
Pennsylvania Corporation; ISAAC  
PERLMUTTER, an individual a/k/a Issy  
Perlmutter, an individual; and DOES 1-50,  
inclusive,  
  
Defendants.

Case No.: 2:16-cv-02958-PSG-JPR  
Assigned to the Hon. Philip S. Gutierrez  
and Jean P. Rosenbluth (Magistrate)

**DEFENDANT BIRDSBORO KOSHER  
FARMS CORPP.'S NOTICE OF  
MOTION AND MOTION TO DISMISS  
PLAINTIFF'S COMPLAINT [FRCP  
12(b)(6)] OR IN THE ALTERNATIVE,  
FOR A MORE DEFINITE  
STATEMENT [FRCP 12(e)]; AND  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT  
THEREOF**

**Date: 7/18/2016**  
**Time: 1:30 p.m.**  
**Dept.: 880 - Roybal**

**TO THE COURT, ALL PARTIES, AND THEIR COUNSEL OF RECORD:**

**PLEASE TAKE NOTICE** that at 1:30 p.m. on July 18, 2016 or as soon thereafter as this matter may be heard, before the Honorable Philip S. Gutierrez in Courtroom 880 - Roybal of the above-entitled Court located at 255 East Temple St., Los Angeles, CA 90012, defendant Birdsboro Kosher Farms Corp. ("BKF") will and hereby does move this Court for an Order dismissing plaintiff Yoram Cohen's ("Cohen") Complaint pursuant to Federal Rules of Civil Procedure ("FRCP") 12(b)(6) or in the alternative requiring Cohen to make a more definite statement pursuant to FRCP 12(e).

This Motion is made on the grounds that:

- (1) The Complaint does not allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly* (2007) 550 U.S. 544, 570; FRCP 8(a);
- (2) The Complaint does not allege fraud with the requisite particularity set forth in FRCP 9(b);
- (3) The First Cause of Action for Fraud fails to state a claim for which relief can be granted;
- (4) The Fifth Cause of Action for Breach of Corporate Guaranty fails to state a claim upon which relief can be granted;
- (5) The Sixth Cause of Action for Restitution fails to state a claim upon which relief can be granted;
- (6) The Tenth Cause of Action for Breach of Corporate Guaranty fails to state a claim upon which relief can be granted;
- (7) The Eleventh Cause of Action for Restitution fails to state a claim upon which relief can be granted; and in the alternative
- (8) The Complaint is so unintelligible as a whole that BKF cannot reasonably prepare a response, and therefore requires a more definite statement.

The motion will be based on this Notice of Motion and Motion, the Memorandum

1 of Points and Authorities filed herewith, and the pleadings and papers filed herein.

2 This motion is made following multiple conferences of counsel pursuant to L.R. 7-  
3 3 which have taken place over the preceding several months, the last of which occurred  
4 on May 6, 2016.

5  
6  
7 Dated: May 25, 2016

SCHWIMER WEINSTEIN  
By: /S/ Michael E. Schwimer  
MICHAEL E. SCHWIMER

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10 Attorney(s) for Defendant(s)  
BIRDSBORO KOSHER FARMS CORP.  
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I.**

3 **INTRODUCTION**

4 Although styled as an action based on two purported “loan” transactions, this  
5 lawsuit is anything but that. Rather, this lawsuit is plaintiff Yoram Cohen’s (“Cohen”)  
6 further attempt to profit from an illegal commercial bribery scheme he perpetrated against  
7 defendant Birdsboro Kosher Farms Corp. (“BKF”).

8 Cohen’s complaint (the “Complaint”) admits that he engaged in a typical  
9 commercial bribery scheme wherein he attempted to extract personal benefits from BKF  
10 by bribing one of its officers, Issac Perlmutter (“Mr. Perlmutter”). As alleged by Cohen,  
11 he wired \$200,000 in cash to Mr. Perlmutter in exchange for Mr. Perlmutter agreeing to  
12 award Cohen an exclusive distributorship agreement to sell BKF’s products, and agreeing  
13 to have BKF issue to Cohen a substantial share of BKF’s stock.

14 In an attempt to conceal the true nature of his scheme, Cohen had Mr. Perlmutter  
15 execute *personal* loan documents to be secured by the corporate guarantee of BKF, which  
16 were also executed by Mr. Perlmutter. Cohen now attempts to explain the backwards  
17 nature of this transaction by alleging that he would not lend money to BKF directly  
18 because it was a newly formed company. Yet, if Cohen would not lend to BKF because  
19 in his own opinion, it was not creditworthy, it certainly makes no sense that he would  
20 lend to Mr. Perlmutter based upon the creditworthiness of BKF.

21 If this transaction was anything but an illegal bribery scheme, Cohen would have  
22 loaned the funds directly to BKF secured by a *personal* guarantee of Mr. Perlmutter. Yet,  
23 from the facts admitted by Cohen, the actual “loan” documents attached to the Complaint  
24 as Exhibitis, and the timing and mechanics of the alleged loan transaction, it is clear that  
25 this was (and is) an illegal bribery scheme that Cohen is now attempting to masquerade  
26 as a legitimate loan transaction.

27 Even assuming *arguendo* that the purported “loans” were not a sham, Cohen has  
28 failed to state any viable claim for relief as against BKF. Cohen has failed to plead fraud

1 with particularity as required by FRCP 9(a). He has failed to allege all of the elements of  
 2 fraud as against BKF. On the face of the Complaint, he cannot as a matter of law allege  
 3 that Mr. Perlmutter had the authority to act on behalf of BKF, that any misrepresentations  
 4 were actually made, or that he was justified in his alleged reliance. In fact, as to BKF,  
 5 Cohen's fraud claim is also barred by the applicable Statute of Frauds that requires  
 6 representations regarding a third party's credit to be made in writing in order to be  
 7 actionable. Further, Cohen's attempt to enforce the purported corporate guarantees fail  
 8 because Mr. Perlmutter had no authority to act on behalf of BKF, they lack consideration,  
 9 and are a sham. Finally, Cohen's claims for restitution against BKF fail because  
 10 restitution is a remedy, not a cause of action, Cohen has alleged a contract between  
 11 himself and BKF precluding an action in general assumpsit, and Cohen has not alleged  
 12 that he ever enriched BKF.

13 Thus, as to BKF, Cohen has not and cannot state a viable claim upon which relief  
 14 can be granted, and this action should be dismissed as to BKF with prejudice.

## 15 II.

### 16 SUMMARY OF THE COMPLAINT

17 Cohen alleges that he made two "loans" to Mr. Perlmutter, each in the amount of  
 18 \$100,000, and each purportedly secured by the "corporate guarantee" of BKF.  
 19 Complaint ¶¶ 10-15. According to Cohen, he made these "loans" to Mr. Perlmutter in  
 20 exchange for Mr. Perlmutter (who is alleged to have been "a major shareholder, officer,  
 21 and director of BKF") agreeing to use his positions as a director and officer of BKF to  
 22 award Cohen with an "exclusive distributorship agreement for the sale of BKF's goods  
 23 throughout Los Angeles County and Orange County," and to issue to Cohen shares of  
 24 BKF stock. Complaint ¶¶ 9, 10, and 11. Cohen further alleges that he made the two  
 25 "loans" based on Mr. Perlmutter's representations that Mr. Perlmutter and BKF were "in  
 26 strong financial health" and as to the second "loan," that Mr. Perlmutter and BKF could  
 27 and would repay the first "loan." ¶¶ 18-19. Cohen claims that Mr. Perlmutter never  
 28 repaid the "loans," and is now suing Mr. Perlmutter and BKF. See Complaint ¶¶ 28 and



53. Cohen has alleged five causes of action against BKF: fraud, breach of corporate guaranty with respect to each “loan,” and restitution with respect to each “loan.” *See* Complaint. Mr. Perlmutter has not yet appeared in this action and Cohen has obtained a default judgment against him.

### III.

#### LEGAL STANDARD

##### **A. MOTION TO DISMISS [FRCP 12(b)(6)]**

A motion to dismiss under FRCP 12(b)(6) tests the legal sufficiency of the pleadings and allows a court to dismiss a complaint upon a finding that the plaintiff has failed to state a claim upon which relief may be granted. *See Navarro v. Block* (9th Cir. 2001) 250 F.3d 729, 732. The court may dismiss a complaint as a matter of law for: (1) “lack of cognizable legal theory,” or (2) “insufficient facts under a cognizable legal claim.” *SmileCare Dental Grp. v. Delta Dental Plan of Cal.* (9th Cir. 1996) 88 F.3d 780, 783 (citation omitted).

The reviewing court need not accept “legal conclusions” as true. *Ashcroft v. Iqbal* (2009) 556 U.S. 662. It is also improper for the court to assume “the [plaintiff] can prove facts that [he or she] has not alleged.” *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters* (1983) 459 U.S. 519, 526. On the other hand, “[w]hen there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.” *Iqbal* 556 U.S. at 675. The court only reviews the contents of the complaint, accepting all factual allegations as true, and drawing all reasonable inferences in favor of the nonmoving party. *See al-Kidd v. Ashcroft* (9th Cir. 2009) 580 F.3d 949, 956 (citations omitted).

##### **B. MOTION FOR A MORE DEFINITE STATEMENT [FRCP 12(e)]**

A Rule 12(e) motion for a more definite statement is proper where the complaint is so indefinite that a defendant cannot ascertain the nature of the claim being asserted. *Tempur-Pedic Int'l Inc. v. Angel Beds LLC* (SD TX 2012) 902 F.Supp.2d 958, 971 (“touchstone” is whether defendant can reasonably prepare a response); *Medrano v. Kern*

1 *County Sheriff's Officer* (ED CA 2013) 921 F.Supp.2d 1009, 1013. A Rule 12(e) motion  
 2 is also proper “where allegations in a complaint are conclusory, confused, and unclear,  
 3 but do not justify dismissal of the suit on the merits and without leave to amend.”  
 4 *Balderrama v. Pride Indus., Inc.* (WD TX 2013) 963 F.Supp.2d 646, 667 (internal quotes  
 5 omitted). Thus, a Rule 12(e) motion is proper where a complaint fails to specify which of  
 6 several defendants were responsible for numerous wrongs alleged. *See e.g., McHenry v.*  
 7 *Renne* (9th Cir. 1996) 84 F.3d 1172, 1174-1175.

#### 8 IV.

#### 9 ARGUMENT

##### 10 A. ***THE COMPLAINT IS NOT PLAUSIBLE ON ITS FACE***

11 The complaint fails to state sufficient facts to satisfy the plausibility requirement of  
 12 FRCP 8(a).

##### 13 1. **Legal Standard for Plausibility.**

14 Federal Rule of Civil Procedure 8(a)(2) requires that a complaint contain a “short  
 15 and plain statement of the claim showing that the pleader is entitled to relief.” A  
 16 complaint must therefore provide a defendant with “fair notice” of the claims against it  
 17 and the “grounds upon which [they] rest.” *See Bell Atlantic Corp. v. Twombly* (2007)  
 18 550 U.S. 544, 555 (quotation and citation omitted). Further, a complaint must allege  
 19 “enough facts to state a claim to relief that is plausible on its face.” *Id.* at 570.

20 The purpose of the “fair notice” and “plausibility” requirements is “to prevent  
 21 settlement extortion—using discovery to impose asymmetric costs on defendants in order  
 22 to force a settlement advantageous to the plaintiff regardless of the merits of his suit.”  
 23 *Pension Benefit Guar. Corp. ex rel. St. Vincent Catholic Med. Ctrs. Retirement Plan v.*  
 24 *Morgan Stanley Investment Mgmt. Inc.* (2nd Cir. 2013) 712 F.3d 705, 719; *Atieh v.*  
 25 *Riordan* (1st Cir. 2013) 727 F.3d 73, 76 (“The plausibility standard is a screening  
 26 mechanism designed to weed out cases that do not warrant either discovery or trial”);  
 27 *Twombly* 550 U.S. at 558-559; *see also Somers v. Apple, Inc.* (9th Cir. 2013) 729 F.3d  
 28 953, 966 (“specificity of facts is warranted before permitting a case to proceed into costly

1 and protracted discovery in an antitrust case”).

2 **2. Cohen has Alleged an Illegal Commercial Bribery Scheme.**

3 Once the conclusory allegations in the Complaint are disregarded, what remains is  
4 a run of the mill commercial bribery scheme between Cohen and Mr. Perlmutter,  
5 absolving BKF of any liability.

6 California Penal Code § 641.3 defines commercial bribery as follows:

7 Any employee who solicits, accepts, or agrees to accept money or any thing  
8 of value from a person other than his or her employer, other than in trust for  
9 the employer, corruptly and without the knowledge or consent of the  
10 employer, in return for using or agreeing to use his or her position for the  
11 benefit of that other person, and any person who offers or gives an employee  
money or any thing of value under those circumstances, is guilty of  
commercial bribery.

12 California Penal Code § 641.3(a)<sup>1</sup>.

13 Here, the facts alleged in the complaint are that Cohen (an outsider to BKF)  
14 electronically transferred \$200,000 in cash directly to Mr. Perlmutter (a director and  
15 officer of BKF). In exchange, Mr. Perlmutter would award Cohen an “exclusive  
16 distributorship agreement for the sale of BKF’s goods throughout Los Angeles County  
17 and Orange County,” and issue to Cohen shares of BKF stock. Thus, on the face of the  
18 Complaint, Cohen unwittingly admits a *prima facie* showing that he and Mr. Perlmutter  
19 committed commercial bribery in the amount of \$200,000, a felony in California.

20 **3. Commercial Bribery is the Obvious and Only Explanation for the**  
21 **Facts Alleged.**

22 The obvious and only explanation is that the alleged “promissory notes” and  
23 “corporate guarantees” attached as Exhibits 1 and 2 to the Complaint, are shams meant to  
24 conceal the true nature of the transaction as a bribery scheme. At the outset, Cohen’s  
25 entire premise as to why he purportedly structured the transaction as a “loan” to Mr.

26 <sup>1</sup>For the purposes of this section, “Employee” is defined as an officer, director, agent,  
27 trustee, partner, or employee, and “employer is defined as a corporation, association,  
28 organization, trust, partnership, or sole proprietorship.

1 Perlmutter secured with a “corporate guaranty” from BKF is logically flawed. If Cohen  
 2 would not lend directly to BKF because he was “unwilling to make the loan to a newly  
 3 formed business” (because it did not have strong financials) (Complaint ¶ 11)<sup>2</sup>, it makes  
 4 no sense that he *would* make the same loan to Mr. Perlmutter secured by a guarantee  
 5 from BKF. By Cohen’s own logic, if this were a legitimate transaction, the “loan” would  
 6 have been made to BKF, the money disbursed directly to BKF, with a *personal* guarantee  
 7 from Mr. Perlmutter, not the other way around as Cohen has alleged. Thus, the obvious  
 8 and only explanation is that the loan documents were a sham to conceal Cohen’s felony  
 9 bribery scheme).

10 The Exhibits to the Complaint (the “loan” and “guarantee” documents themselves)  
 11 only further reveal this alleged transaction to be a sham. At the end of both Exhibits 1  
 12 and 2 to the Complaint are copies of envelopes with FedEx shipping labels. *See* Exhibits  
 13 1 and 2 to the Complaint. The implication clearly intended by Cohen is that the executed  
 14 promissory notes and corporate guarantees that preceded each respective envelope were  
 15 contained within each respective envelope, and shipped according to the information on  
 16 the labels. Unfortunately for Cohen, those shipping labels contradict his story. The first  
 17 shipping label (the last page of Exhibit 1) bears a date of June 17, 2013, and the second  
 18 shipping label (the last page of Exhibit 2) bears a date of June 13, 2013. So, if Cohen’s  
 19 story is now to be believed, he wired the first \$100,000 to Mr. Perlmutter on February 4,  
 20 2013, but did not receive an executed note and guarantee until at least June 13, 2013. In  
 21 light of Cohen’s alleged need for security *before* agreeing to make the loan, the timing  
 22 simply makes no sense (unless of course, the loan documents were a sham to conceal  
 23 Cohen’s felony bribery scheme).

24 Finally, the alleged mechanics of the two “loan” transactions (i.e., when the  
 25 “loans” were allegedly made and to be repaid) reveals them to be a sham. Cohen alleges  
 26 that the first “loan” for \$100,000 was made on February 4, 2013, and according to its

27 <sup>2</sup> As set forth below, this allegation also eviscerates any claim by Cohen that he relied  
 28 upon BKF’s financial condition in making the “loans.”

terms (*See* Exhibit 1 to the Complaint), it was to be repaid on June 28, 2013. Cohen then alleges that the second “loan” for \$100,000 was made on June 11, 2013, and according to its terms (*See* Exhibit 2 to the Complaint), it was to be repaid on July 11, 2013, just thirteen days after the first “loan” was originally due to be repaid.

However, in light of Cohen’s allegation that he demanded repayment of the first “loan” as a condition of making the second, it makes no sense that the first “loan” would have been repaid three weeks early in exchange for a second “loan” of the exact same amount of money, due to be paid less than two weeks after the first “loan” would have otherwise become due. In other words, it makes no sense that there would have been two separate “loan” transactions simply to extend the due date of the first “loan” by less than two weeks (unless of course, the loan documents were a sham to conceal Cohen’s felony bribery scheme).

Thus, once the conclusory allegations of the Complaint are disregarded, the obvious and indeed only explanation that fits the *facts* alleged is that Cohen was engaged in a commercial bribery scheme to obtain benefits from BKF in the form of an exclusive distribution agreement and shares of BKF stock. Whether or not pursuing BKF on the purported corporate guarantees was part of that scheme from the beginning, since the Cohen admits to participating in an illegal scheme against BKF, he certainly cannot recover against it.

***B. COHEN FAILS TO PLEAD FRAUD WITH THE REQUISITE PARTICULARITY***

The Complaint is fatally defective because it fails to satisfy the FRCP 9(b) particularity requirement for averring fraud with particularity.

In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated “with particularity.” FRCP 9(b); *Desaigoudar v. Meyercord* (9th Cir. 2000) 223 F.3d 1020, 1022-1023 (fraud must be pled “with a high degree of meticulousness”). With respect to state law fraud claims, each element must be alleged with particularity as required by FRCP 9(b). *Vess v. Ciba-Geigy Corp. USA* (9th Cir.

2003) 317 F.3d 1097, 1103. Further, by its terms, Rule 9(b) applies to all allegations of fraud, not just claims of fraud. *Borsellino v. Goldman Sachs Group, Inc.* (7th Cir. 2007) 477 F.3d 502, 507; *Kearns v. Ford Motor Co.* (9th Cir. 2009) 567 F.3d 1120, 1125-1126.

Allegations that are vague or conclusory are insufficient to satisfy the “particularity” required by Rule 9(b). *Moore v. Kayport Package Express, Inc.* (9th Cir. 1989) 885 F.2d 531, 540. Thus, Rule 9(b) requires that “the who, what, when, and where must be laid out” for each element of a fraud claim. *See e.g., Williams v. WMX Technologies, Inc.* (5th Cir. 1997) 112 F.3d 175, 178. Where several defendants are sued in connection with an alleged fraudulent scheme, plaintiffs must “inform each defendant separately of the allegations surrounding his alleged participation in the fraud.” *Swartz v. KPMG LLP* (9th Cir. 2007) 476 F.3d 756, 764-765 (emphasis added). When fraud has allegedly been perpetrated by a corporation, the complaint “must allege the names of the employees or agents who purportedly made the fraudulent representations or omissions, or at a minimum identify them by their titles and/or job responsibilities.” *UMG Recordings, Inc. v. Global Eagle Entertainment, Inc.* (CD CA 2015) \_\_ F.Supp.3d \_\_, \_\_ (2015 WL 4606077, \*9). Allegations that “everyone did everything” justify dismissal of the complaint. *Destfino v. Reiswig* (9th Cir. 2011) 630 F.3d 952, 958.

Here, Cohen has failed to satisfy the Rule 9(b) particularity requirements because he has failed to plead allegations and elements of fraud with particularity as to each defendant. Although the Complaint contains multiple causes of action, each is based on the general allegations which allege a fraudulent course of conduct. Further, the first cause of action for fraud is incorporated by reference into each and every other cause of action in the Complaint. Thus, Rule 9(b) requires that the entire Complaint be pleaded with particularity. This, however, was not done.

The entire Complaint is vague and overgeneralized. In particular, Cohen fails to state the who, what, when, and where, for any of the alleged misrepresentations. It is not even clear what *are* the misrepresentations supporting the fraud claim. Further, Cohen impermissibly lumps Mr. Perlmutter and BKF together, and fails to make it clear if or



1 when Mr. Perlmutter is alleged to have acted individually or on behalf of BKF.

2 Thus, Cohen has failed to satisfy the particularity requirements of Rule 9(b).

3 ***C. THE FIRST CAUSE OF ACTION FOR FRAUD FAILS TO STATE***  
 4 ***FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION***

5 Assuming *arguendo* that the alleged transaction was not an illegal sham, the first  
 6 cause of action for Fraud nonetheless fails to state facts sufficient to constitute a cause of  
 7 action against BKF.

8 ***1. As a Matter of Law Mr. Perlmutter had no Authority to Act on***  
 9 ***Behalf of BKF.***

10 As a corporation, BKF can only be liable for the misrepresentations of those with  
 11 authority to act on its behalf. However, California law has made it clear that under the  
 12 alleged facts of this case (i.e. a corporate officer or director receiving a personal benefit  
 13 secured by a corporate guarantee) there can be no authority to bind the corporation as a  
 14 matter of law. *See Saks v. Charity Mission Baptist Church* (2001) 90 Cal.App.4th 1116,  
 15 1121 (“where an officer of a corporation is openly using the corporation to obtain a  
 16 benefit for himself...the other parties to the transaction cannot later seek to hold the  
 17 corporation liable for his actions.”); *Meyer v. Glenmoor Homes, Inc.* (1966) 246  
 18 Cal.App.2d 242, 261 (“The officers of a corporation have no power to authorize the  
 19 execution of a note as surety for another in respect to a matter having no relation to the  
 20 corporate business...and a party receiving such note...cannot recover on it.”); *Hall v.*  
 21 *Auburn Turnpike Co.* (1865) 27 Cal. 255, 257; *see also* California Corporations Code §  
 22 315 (generally prohibiting corporations from guaranteeing obligations of directors or  
 23 officers). Even assuming *arguendo* that it was legally possible for Mr. Perlmutter to have  
 24 authority to act on behalf of BKF, Cohen has failed to allege any such authority with the  
 25 requisite particularity.

26 ***2. Cohen has not Alleged any Actionable Misrepresentations.***

27 A necessary element of fraud is an *actionable* misrepresentation. However,  
 28 statements of *opinion* are not actionable. *See Padgett v. Phariss* (1997) 54 Cal.App.4th

1 1270, 1284. A representation is one of opinion “if it expresses only (a) the belief of the  
 2 maker, without certainty, as to the existence of a fact; or (b) his judgment as to quality,  
 3 value, authenticity, or other matters of judgment.” Rest.2d, Torts §538A.

4 Here, Cohen appears to allege two separate misrepresentations. The first, allegedly  
 5 made to induce Cohen to make the first “loan,” that “Issy and BKF are in strong financial  
 6 health.” Complaint ¶ 18. The second, allegedly made to induce Cohen to make the  
 7 second “loan,” that “the First Loan will be timely repaid and that BKF and ISSY have the  
 8 financial ability to repay the Second loan.” Complaint ¶ 19. Both of these statements are  
 9 those of opinion, and not concrete facts, as they clearly are based on Mr. Perlmutter’s  
 10 subjective belief as to what constitutes “strong financial health” or the “ability” to timely  
 11 repay a loan.

12 **3. Cohen’s Fraud Claim Against BKF is Barred by the Statute of**  
 13 **Frauds.**

14 There is a second reason why Cohen has failed to allege any actionable  
 15 misrepresentations against BKF, namely, the Statute of Frauds. Under the Statute of  
 16 Frauds of California, a *writing* is necessary to charge a person “upon a representation as  
 17 to the credit of a third person.” California Code of Civil Procedure § 1974; *see Carr v.*  
 18 *Tatum* (1933) 133 Cal.App. 274, 277. Thus, “[w]here the primary purpose in making the  
 19 representation is to procure credit for another, the representation comes within the  
 20 purview of the statute even though in making it the person also makes false  
 21 representations concerning himself or derives an incidental benefit therefrom.” *Grant v.*  
 22 *U. S. Elecs. Corp.* (1954) 125 Cal.App.2d 193, 198.

23 Here, the Statute of Frauds is directly applicable because Cohen is attempting to  
 24 charge BKF with representations made to Cohen by Mr. Perlmutter regarding BKF’s  
 25 creditworthiness for the purpose of procuring credit for Mr. Perlmutter. Thus, under the  
 26 California Code of Civil Procedure § 1974, any alleged oral representations made by Mr.  
 27 Perlmutter regarding either his, or BKF’s financial condition, ability, or intention to repay  
 28 either of the “loans” cannot be charged against BKF, and the statute serves as a complete



1 bar to this action against BKF.

2 **4. Cohen cannot Allege Reasonable Reliance.**

3 Another necessary element of fraud is reasonable reliance. Thus, where the  
4 circumstances are such as to make it unreasonable for plaintiff to accept the defendant's  
5 statements without an independent inquiry or investigation, no action for  
6 misrepresentation will lie. *Kahn v. Lischner* (1954) 128 Cal.App.2d 480, 489.

7 Here, Cohen has alleged sufficient facts to make it objectively unreasonable for  
8 him to have relied upon any statements regarding BKF's creditworthiness. Since Cohen  
9 has already alleged that he refused loan BKF money because BKF was a new company,  
10 and as such was not creditworthy in his opinion, he cannot also allege that he relied upon  
11 representations of BKF's creditworthiness in deciding to make a loan to Mr. Perlmutter  
12 *secured* by a corporate guaranty of BKF. The two allegations are directly contradictory.  
13 By his own allegations, Cohen did not believe that BKF was in "good financial health,"  
14 otherwise he would have loaned the money directly to BKF. Accordingly, Cohen cannot  
15 now also claim that he relied upon representations that BKF *was* creditworthy as  
16 inducement to make the "loans."

17 **D. THE FIFTH AND TENTH CAUSES OF ACTION FOR BREACH OF**  
18 **CORPORATE GUARANTY FAIL TO STATE FACTS SUFFICIENT TO**  
19 **CONSTITUTE A CAUSE OF ACTION**

20 Assuming *arguendo* that the alleged transaction was not an illegal sham, the fifth  
21 and tenth causes of action for Breach of Corporate Guaranty nonetheless fail to state facts  
22 sufficient to constitute causes of action against BKF because as a matter of law, Mr.  
23 Perlmutter lacked the authority to bind BKF, and on the face of the Complaint both  
24 guarantees were a sham. Further, these causes of action lack the requisite particularity  
25 required under state law.

26 As stated above, BKF cannot be bound by any alleged corporate guaranty if Mr.  
27 Perlmutter did not have the authority to act on its behalf. Likewise, as discussed above,  
28 as a matter of law, Mr. Perlmutter could not have had such authority under the

1 circumstances alleged. As a corollary, since Cohen has admitted to participating in an  
 2 illegal scheme, any consideration for the guarantees fails and they are void *ab initio*.

3 Further, on the face of the Complaint, the two “corporate guarantees” are a sham  
 4 because as alleged the debtor and principal obligor are the same. “A guaranty is an  
 5 unenforceable sham where the guarantor is the principal obligor on the debt. This is the  
 6 case where either (1) the guarantor personally executes underlying loan agreements or a  
 7 deed of trust, or (2) the guarantor is, in reality, the principal obligor under a different  
 8 name by operation of trust or corporate law or some other applicable legal principle.”  
 9 *CADC/RAD Venture 2011-1 LLC v. Bradley* (2015) 235 Cal.App.4th 776, 786–87. Here,  
 10 the “corporate guarantees” are a sham because they were personally executed by the  
 11 same person who was also the purported debtor – Mr. Perlmutter.

12 Finally, these causes of action have not been alleged with the requisite  
 13 particularity. California law requires that a complaint in an action on a suretyship  
 14 obligation shows the primary obligation of the principal debtor corresponding to the  
 15 obligation of the surety, the execution and delivery of the undertaking or guaranty, the  
 16 default of the principal, the failure of the defendant to pay or perform the obligation, and  
 17 the plaintiff’s damages. *See Stephens v. Daugherty*, (1917) 33 Cal.App. 733. Essential  
 18 matters *must* be pleaded by direct averment, not by inference, and a complaint may be  
 19 rendered demurrable for ambiguity and uncertainty. *Hege v. Worthington, Park &*  
 20 *Worthington* (1962) 209 Cal.App.2d 670. Here, Cohen has only made the most  
 21 conclusory of allegations with respect to the alleged breaches of the guarantees. Thus, he  
 22 has failed to allege these causes of action with the requisite particularity.

23 ***E. THE SIXTH AND ELEVENTH CAUSES OF ACTION FOR***  
 24 ***RESTITUTION FAIL TO STATE FACTS SUFFICIENT TO***  
 25 ***CONSTITUTE A CAUSE OF ACTION***

26 Assuming *arguendo* that the alleged transaction was not an illegal sham, the sixth  
 27 and eleventh causes of action for Restitution nonetheless fail to state facts sufficient to  
 28 constitute causes of action against BKF because “restitution” is a remedy, not a cause of

1 action. Further, since Cohen has alleged a valid express contract, and Cohen has failed to  
 2 allege that BKF received any cash from Cohen, he has failed to otherwise state a quasi-  
 3 contract claim.

4 “A ‘cause of action’ must be distinguished from the remedy sought: The violation  
 5 of one primary right constitutes a single cause of action, though it may entitle the injured  
 6 party to many forms of relief, and the relief is not to be confounded with the cause of  
 7 action, one not being determinative of the other.” *Marlin v. Aimco Venezia, LLC* (2007)  
 8 64 Cal.Rptr.3d 488, 494. When a complaint pleads a remedy as a cause of action, that  
 9 “cause of action” is properly attacked by way of a motion to dismiss pursuant to FRCP  
 10 12(b)(6). *See Bridgeman v. United States* (ED CAL 2011) 2:10-CV-01457 JAM, 2011,  
 11 WL 221639.

12 Cohen’s sixth and eleventh causes of action are for “restitution.” However, “there  
 13 is no cause of action in California for unjust enrichment... [which] is synonymous with  
 14 restitution.” *Durell v. Sharp Healthcare* (2010) 183 Cal.App.4th 1350, 1370. Further,  
 15 since Cohen has alleged express contracts between himself and BKF – namely the  
 16 corporate guarantees – he cannot also proceed in general assumpsit. Further, Cohen has  
 17 failed to even allege that *BKF* received any cash from *Cohen*. Indeed, Cohen alleges that  
 18 he refused to give any cash to BKF, and instead gave it to Mr. Perlmutter. Thus, Cohen  
 19 has not, and cannot allege that BKF was unjustly enriched by Cohen.

20 ***F. IN THE ALTERNATIVE COHEN SHOULD BE ORDERED TO SERVE***  
 21 ***A MORE DEFINITE STATEMENT***

22 Should the Court not be inclined to grant this Motion under FRCP 12(b)(6), it is  
 23 respectfully requested that the Court order Cohen to file a more definite statement so that  
 24 BKF may determine the claims against it and prepare a response.

25 **V.**

26 **CONCLUSION**

27 For the reasons stated herein, BKF respectfully requests that the Court grant this  
 28 motion without leave to amend or order Cohen to file a more definite complaint.

1 Dated: May 25, 2016

SCHWIMER WEINSTEIN  
By: /S/ Michael E. Schwimer  
MICHAEL E. SCHWIMER

Attorney(s) for Defendant(s)  
BIRDSBORO KOSHER FARMS CORP.

**PROOF OF SERVICE**

I am employed in the County of Los Angeles, State of California; I am over the age of eighteen years and not a party to the within action; my business address is 2665 Main St., Suite 200, Santa Monica, CA 90405.

On May 25, 2016, I served the foregoing documents described as MOTION TO DISMISS OR IN THE ALTERNATIVE, FOR A MORE DEFINITE STATEMENT; AND [PROPOSED] ORDER THEREON on all interested parties in this action by placing a true copy thereof in a sealed envelope addressed as follows:

**Attorney(s) for Plaintiff**

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**Electronic Service List**

**The following are those who are currently on the list to receive e-mail notices for this case.**

**FEDERAL:** I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on May 25, 2016, at Santa Monica, California.

/S/ Michael E. Schwimer

MICHAEL E. SCHWIMER.